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Report of the Working Group

Chapter 8
Evidence

Rule 6.1
General provisions relating to evidence

1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

4. Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

5. The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

Rule 6.2
Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not

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known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 6.16, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

Rule 6.7 *ante*
Compellability of witnesses

1. A witness who appears before the Court is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the Rules, in particular rules 6.4, 6.9 and 6.9 *bis*.

2. Rule 6.41 applies to a witness appearing before the Court who is compellable to provide testimony under sub-rule 1.

Rule 6.7
Solemn undertaking

1. Except as described in sub-rule 2, every witness shall, in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying:

> "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

2. A person under the age of 18 or a person whose judgement has been impaired and who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.

3. Before testifying, the witness shall be informed of the offence defined in article 70, paragraph 1 (a).

Rule 6.26
Live testimony by means of audio or video-link technology

1. In accordance with article 69, paragraph 2, a Chamber may allow a witness to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

Rule 6.27
Prior recorded testimony

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Rule 6.3
Agreements as to evidence

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.

Rule 6.8
Findings and evidence from other proceedings

1. Without prejudice to the rights of an accused under article 67, a Chamber may, at the request of the Prosecutor, the defence, or victims or their legal representatives participating in the proceedings pursuant to rules 6.30 to 6.30 *ter*, admit as evidence without further proof:

(a) With the consent of the defence, the specific factual findings of a Chamber from other proceedings;

(b) Documentary or other physical evidence from other proceedings of a Chamber, where such evidence is relevant to matters at issue in the current proceedings. The Prosecutor and the defence have the right to submit evidence and arguments to challenge such documentary or physical evidence.

2. The Chamber shall hear the participants to the proceedings prior to admitting any such evidence.

Rule 6.5
Principles of evidence in cases of sexual violence

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Rule 6.5 *bis*
Evidence of other sexual conduct

In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Rule 6.5 *ter*
In camera procedure to consider relevance or admissibility of evidence

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 6.5, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 6.5, especially with respect to the proposed questioning of a victim.

3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 6.5.

Rule 6.4
Privileged communications and information

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(a) The person consents in writing to such disclosure; or

(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

2. Having regard to rule 6.1, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and

(c) Recognition of the privilege would further the objectives of the Statute and the Rules.

3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence of, the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

Rule 6.9
Self-incrimination by a witness

1. Unless a witness has been notified pursuant to rule 9.14, the Chamber shall notify a witness of the provisions of this rule before his or her testimony.

2. Where the Court determines that an assurance with respect to self-incrimination should be provided to a particular witness, it shall provide the assurances under sub-rule 3, paragraph (c), before the witness attends, directly or pursuant to a request under article 93, paragraph (1) (e).

3. (a) A witness may object to making any statement that might tend to incriminate him or her.

(b) Where the witness has attended after receiving an assurance under sub-rule 2, the Court may require the witness to answer the question or questions.

(c) In the case of other witnesses, the Chamber may require the witness to answer the question or questions, after assuring the witness that the evidence provided in response to the questions:

(i) Will be kept confidential and will not be disclosed to the public or any State; and

(ii) Will not be used either directly or indirectly against that person in any subsequent prosecution by the Court, except under articles 70 and 71.

4. Before giving such an assurance, the Chamber shall seek the views of the Prosecutor, ex parte, to determine if the assurance should be given to this particular witness.

5. In determining whether to require the witness to answer, the Chamber shall consider:

(a) The importance of the anticipated evidence;

(b) Whether the witness would be providing unique evidence;

(c) The nature of the possible incrimination, if known; and

(d) The sufficiency of the protections for the witness, in the particular circumstances.

6. If the Chamber determines that it would not be appropriate to provide an assurance to this witness, it shall not require the witness to answer the question. If

the Chamber determines not to require the witness to answer, it may still continue the questioning of the witness on other matters.

7. In order to give effect to the assurance, the Chamber shall:

(a) Order that the evidence of the witness be given in camera;

(b) Order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanction under article 71;

(c) Specifically advise the Prosecutor, the accused, the defence counsel and any Court staff present of the consequences of a breach of the order under subparagraph (b);

(d) Order the sealing of any record of the proceedings; and

(e) Use protective measures with respect to any decision of the Court to ensure that the identity of the witness and the content of the evidence given are not disclosed.

8. Where the Prosecutor is aware that the testimony of any witness may raise issues with respect to self-incrimination, he or she shall request an in camera hearing and advise the Chamber of this, in advance of the testimony of the witness. The Chamber may impose the measures outlined in sub-rule 7 for all or a part of the testimony of that witness.

9. The accused, the defence counsel or the witness may advise the Prosecutor or the Chamber that the testimony of a witness will raise issues of self-incrimination before the witness testifies and the Chamber may take the measures outlined in sub-rule 7.

10. If an issue of self-incrimination arises in the course of the proceedings, the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule.

Rule 6.9 *bis*
Incrimination by family members

1. A witness appearing before the Court, who is a spouse, child or parent of an accused person, shall not be required by a Chamber to make any statement that might tend to incriminate that accused person. However, the witness may choose to make such statement.

2. In evaluating the testimony of a witness, a Chamber may take into account that the witness, referred to in sub-rule 1, objected to reply to a question which was intended to contradict a previous statement made by the witness, or the witness was selective in choosing which questions to answer.